FRONT Report LINE

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Top court to hear Missouri *Miranda* case

The U.S. Supreme Court has agreed to review a decision by the Missouri Supreme Court that suppressed and excluded a *Mirandized* confession because the defendant had previously confessed before being given her *Miranda* warnings. The Missouri Attorney General's Office asked the court to hear the case of Patrice Seibert, convicted of second-degree murder for her role in the death of a 17-year-old boy in a fire at her home.

In *State v. Seibert*, the investigating officer intentionally withheld *Miranda* warnings when questioning Seibert after her arrest. When she confessed, the officer then *Mirandized* her, and she again confessed. Only the second confession was used at trial.

The Missouri Supreme Court held that because the officer intentionally questioned Seibert before giving the *Miranda* warnings, the second confession must be excluded, regardless of whether the pre-*Miranda* questioning was coerced.

The state's position is that if the pre-*Miranda* questioning is not coercive, and the suspect receives and understands the *Miranda* warnings before a second confession, then the second confession is admissible at trial, based on the holding of the U.S. Supreme Court in *Oregon v. Elstad*.

The state will argue that compliance with *Miranda* should be judged based on objective factors that affect the voluntariness of the confession, and that courts should not add to the *Elstad* rule an inquiry into the questioning officer's subjective intent.

The Supreme Court also will hear two other significant criminal cases:

● In *Maryland v. Pringle*, police found money and cocaine in the armrest and glove compartment of a vehicle and arrested all three occupants. At issue is whether the information officers had provided was probable cause to arrest all three occupants or even one. Presence alone does not give rise to probable cause, but the court will decide if these facts give probable cause to make a lawful arrest.

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Bill would change several sentencing laws

2003 legislative bills

To find other bills that may impact law enforcement, go to www.senate.state.mo.us for Senate bills and www.house.state.mo.us for House bills.

Missouri legislators passed several bills impacting criminal laws and law enforcement. By press time, the governor had not acted on most of the bills.

Senate Bill 5 significantly changes several state sentencing laws. The bill takes effect immediately if the governor signs it. Provisions would:

● Reduce from five years to four the maximum sentence for class D felonies.

● Add assault of a law enforcement officer in the first degree and other crimes to the list of "dangerous felonies" for which an offender must serve a minimum sentence.

● Revise the sentences for persistent and dangerous offenders.

● Allow certain offenders convicted of nonviolent felonies to petition the court, after serving 120 days, to serve the remainder of their sentences on probation or parole.

● Exclude certain shock incarcerations as prior prison commitments to determine "prior" or "persistent" offender status. SB 5 also would:

SEE SENATE BILL 5, Page 2

Meth offenses: Bill would restrict OTC drugs

Senate Bill 39 restricts over-the-counter sale of drugs containing ephedrine, pseudoephedrine and other related precursors used to make meth.

If the drug contains one of these precursors as its sole active ingredient, the retailer can only sell two packages containing up to 6 grams. Also, these drugs have to be stored behind the counter or within 10 feet and in clear view of the counter. If the retailer has an electronic anti-theft system, the location restrictions do not apply.

If the drug contains a precursor as


2003 legislative bills

an active ingredient, the retailer may sell three packages containing up to 9 grams. There is no location restriction.

Any city ordinance restricting quantity or location of precursors adopted on or after Dec. 23, 2002, is pre-empted if it is more restrictive than the new law. These provisions also were passed in HB 470. The bill also:

- Makes it a class A felony to make or attempt to make a controlled substance within 2,000 feet of a school.
- Makes the unlawful release of anhydrous ammonia a B felony.
- Creates the Missouri Sheriff Methamphetamine Relief Task Force to provide more resources for counties to investigate meth cases.

SENATE BILL 5:

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- Add "emergency personnel" to the crime of assault of a law enforcement officer.
- Increase penalty for endangering the welfare of a child.
- Create crime of tampering with a prescription drug.
- Increase penalty for theft of any meth-making material to a C felony and make it a B felony to steal any amount of anhydrous ammonia.
- Specify that POST-certified officers may carry concealed firearms when off duty or traveling outside their jurisdictions.
- Require any sex offender who must register to inform the chief law enforcement officer if that offender begins or stops attending a Missouri college or university.

Concealed weapons bill on governor's desk

House Bill 349 authorizes citizens to apply for a permit to carry concealed firearms if they are 23 or older; have completed training; and have been fingerprinted.

Applications will be filed with the sheriff or chief of police in counties as designated by the sheriff. The sheriff must review the application.

Once the sheriff receives a satisfactory background check, he shall grant the permit within three working days. If no background check is returned within 45 days, the sheriff shall issue the permit but may revoke it within 24 hours after receiving a disqualifying background check. The sheriff also may deny a permit if he believes the applicant has lied. The sheriff may charge a $50 fee.

As of July 1, 2004, the Department of Revenue shall revise drivers licenses so permittees may be identified on the license.

Permittees cannot carry a concealed firearm into several places including police stations; courthouses solely occupied by the circuit, appellate or supreme court; and other public buildings. The governor has until July 14 to take action on legislation.

HB 327 would revise traffic laws

House Bill 327 changes several traffic laws. Among provisions:

- With certain exceptions, prohibits trucks with a gross weight of 48,000 pounds or more from driving in the left lane of interstate highways in urbanized areas having at least three traffic lanes (class C misdemeanor).
- Creates points violations for drivers younger than 18 who exceed posted limits by 20 mph.
- Prohibits anyone whose commercial drivers license has been suspended or revoked from having a limited driving privilege to operate a commercial vehicle. (Takes effect Sept. 30, 2005.)
- Defines and allows "low-speed vehicles" to operate on state highways where the posted limit is 35 mph or less.

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UPDATE: CASE LAW

Opinions can be found at www.findlaw.com/casecode/index.html

U.S. SUPREME COURT

CONSTITUTIONALITY, CROSS BURNING

Virginia v. Black
No. 01-1107 U.S.S.C. April 7, 2003

Consistent with the First Amendment, a state may ban cross burning carried out with the intent to intimidate, but a Virginia statute provision treating any cross burning as prima facie evidence of an intent to intimidate renders that statute unconstitutional.

Missouri does not have a cross burning statute, but this may change.

MISSOURI SUPREME COURT

PLEADINGS, AGGRAVATING CIRCUMSTANCES

State v. Lewis E. Gilbert
No. 84214
Mo. banc, April 22, 2003

The state is not required to plead, in the information, the statutory aggravating circumstances submitted during the penalty phase. Pursuant to Section 565.005, RSMo, the state gave notice of the aggravating circumstances it intended to prove, and this notice meets the standards of the federal and state constitutions.

DEATH PENALTY, RETARDATION

Ernest Lee Johnson v. State
No. 84502
Mo. banc, April 22, 2003

The motion court clearly erred in not setting aside the defendant's death sentences as excessive. In light of *Atkins v. Virginia*, 536 U.S. 304 (2002), if a defendant can prove mental retardation by a preponderance of the evidence, as set out in Section 565.030.6, RSMo, then that defendant shall not be subject to the death penalty.

In his Rule 29.15 proceeding, Johnson proved ample evidence was available, but not presented sufficiently, to raise questions about his mental capacity. Before trial, three mental health experts for the defense evaluated Johnson.

Their collective evaluations indicated his full-scale IQ is between mild mental retardation and low-average intelligence and he has poor adaptive skills.

The jury did not hear testimony regarding defendant's possible mental retardation, nor was it faced with the *Atkins* pronouncement that death is not a suitable punishment for a criminal who is mentally retarded.

On remand, the court was ordered to set aside defendant's death sentences and set up a new penalty phase hearing.

SEARCHES, KNOCK AND ANNOUNCE

State v. Gary Lynn Baker
No. 84507
Mo. banc, April 1, 2003

In the face of exigent circumstances such as a threat of violence or the likelihood that evidence will be destroyed, law enforcement officials are justified in dispensing with the requirement that they "knock and announce" before entering someone's home. The officers had reasonable suspicion that knocking and announcing their presence would be dangerous or futile or would lead to evidence destruction. They were justified, therefore, in their failure to knock and announce before entering.

EASTERN DISTRICT

POST-CONVICTION DNA TESTING

Rubin Weeks v. State
No. 81171
Mo.App., E.D., April 15, 2003

Defendant is not entitled to post-conviction DNA testing under Section 547.035, RSMo Supp. 2001. Because the defendant pleaded guilty, there was no trial, identity was not an issue and there is not a reasonable probability that he would not have been convicted. It was not clear error to deny the motion without a hearing.

EVIDENCE OF UNCHARGED BAD ACTS

State v. Sylvester Tolliver
No. 81009
Mo.App., E.D., March 25, 2003

Evidence that the defendant had been convicted of numerous assaults against his girlfriend and evidence of another uncharged act of violence against her were admissible to show defendant's motive and intent to commit the charged crimes because self-defense was squarely at issue.

WESTERN DISTRICT

WAIVER OF CONFRONTATION, 491.075 HEARINGS

State v. David L. Hobbs
No. 60430
Mo.App., W.D., March 28, 2003

The court did not plainly err in allowing a Section 491.075 hearing to proceed in defendant's absence because the defendant waived his right to attend the hearing. Trial counsel stated that he did not want the defendant to attend the Section 491.075 hearing, and, once he learned about the hearing, the defendant did not object to not attending.

The pretrial Section 491.075 hearing is more like a pretrial deposition than a pretrial *Batson* or peremptory challenge hearing. The hearing determines whether a hearsay statement made by a child victim " provide[s] sufficient indicia of reliability" to be admitted at trial. Section 491.075.1(1).

At the Section 491.075 hearing, two state witnesses testified about what the victim had told them. Since the nature of the Section 491.075 hearing involved witnesses to confront and evidence against the defendant, he had a Sixth Amendment confrontation right to be present. Defendant, however, waived this right.

UPDATE: CASE LAW

WESTERN DISTRICT

EVIDENCE OF UNCHARGED BAD ACTS

State v. Tyrone E. Henderson
No. 60952
Mo.App., W.D., March 18, 2003

The court reversed the defendant's conviction of first-degree murder, armed criminal action and unlawful use of a weapon when the court admitted evidence that he fired a gun later identified as the murder weapon into a crowd three days after the murder. The signature modus operandi exception (the offenses are so similar and unique as to constitute the signature of the accused) was not met as the offenses were not identical nor their methodology so unique or distinctive as to qualify as defendant's signature. Also, even if the evidence did not have to meet this test, there still would be an abuse of discretion in its admission under case facts.

Evidence of uncharged offenses should be admitted only if strictly necessary. That the defendant later possessed the murder weapon and exercised control over it would have been equally probative concerning his identity as showing that he had the weapon and used it to shoot into a crowd. That he fired the weapon into a crowd added virtually nothing of probative value and did not overcome the extreme prejudice.

DOMESTIC ASSAULT

State v. David E. Daniel
No. 61165
Mo.App., W.D., March 18, 2003

There was sufficient evidence to convict the defendant of first-degree domestic assault under Section 565.072. Evidence established that the defendant and his victim had been in a "continuing social relationship of a romantic or intimate nature," as used in Section 565.072. For purposes of this statute, such a relationship need not be completely uninterrupted to qualify for protection.

SEARCH AND SEIZURE

State of Missouri v. Kim F. Courtney
No. 61163
Mo.App., W.D., April 15, 2003

The court reversed the defendant's conviction of possessing meth due to an illegal search and seizure. The defendant had a legitimate expectation of privacy in the contents of a container police seized from him.

Because police did not have a warrant to search the container, an exception to the warrant requirement had to exist. The only potential exceptions identified were those for frisks or pat-down searches and the exception for items discovered in plain view or by plain feel.

The exception for frisks does not apply because the police did not have a reasonable belief that the container threatened safety. The plain view-plain feel exception does not apply because the police only discovered the contents after an officer twisted off the top of the container and peered inside.

SOUTHERN DISTRICT

TERRY STOPS

State v. Jeffrey A. Schmutz
No. 24742
Mo.App., S.D., March 31, 2003

The court reversed the defendant's conviction of DWI since evidence was improperly admitted because the police officer lacked reasonable suspicion to conduct a Terry stop of the defendant.

The officer had a "hunch" that clearly did not justify the Terry stop. The officer testified he was "suspicious" because the vehicle parked for a period of time on a strip mall parking lot at 12:30 a.m., but acknowledged he did not "see the truck violate any traffic laws or do anything unusual at that time."

When the driver began to leave, the officer stopped him. While the behavior may cause the officer to wonder about the suspect's activity, it does not rise to the level of "reasonable suspicion" to justify a Terry stop.

SUFFICIENCY OF EVIDENCE, DWI

State v. Kevin Anderson
No. 24899
Mo.App., S.D., April 24, 2003

The court reversed the defendant's conviction of driving while intoxicated since there was no evidence the defendant's truck hit another car, he was driving the truck or he was intoxicated.

DISTRIBUTE CONTROLLED SUBSTANCE

State v. Archie A.L. Kellner
No. 24914
Mo.App., S.D., April 21, 2003

There was sufficient evidence of the defendant's conviction of distribution of a controlled substance. Evidence showed that the defendant possessed meth in a baby food jar and "gave" it to another – such actions meeting the definition of deliver— and therefore distribute, as it relates to a violation under Section 195.211.

The witness's prior inconsistent statement under Section 491.074 was admissible as substantive evidence.

SEXUAL MISCONDUCT, COERCION

State v. Arthur Garner
No. 25042
Mo.App., S.D., April 11, 2003

In a prosecution for sexual misconduct involving a child, the evidence was sufficient that the defendant compelled, by force or threat, the victims to expose their genitals to arouse or gratify his sexual desire even though there was no physical force used.

The force or threat used to compel the victims to expose themselves was subtle and psychological but no less forceful than if the defendant had used physical violence. Because the defendant was the supervising adult, he was in a position of power.

Traffic stops report refutes de-policing concerns

Attorney General Nixon released the 2002 report on traffic stops, documenting 1,369,185 stops, 108,539 searches and 79,576 arrests made by 620 agencies, providing information for several racial and ethnic groups. The 2002 report is the third report compiled by the AG's Office since enactment of Section 590.650 in 2000.

Nixon said concerns that the requirement to compile traffic stop information would result in de-policing were clearly refuted by the 2002 report, which showed less than a 2 percent decrease in total stops. The number of searches increased by almost 9 percent from 2001 to 2002, and the number of arrests was up by almost 4 percent.

"Despite being outnumbered, overworked and underpaid, law enforcement officers around the state continue to serve the public and faithfully discharge their duties as they always have and, I believe, always will," Nixon said.

Nixon and criminologist Scott Decker discuss the report at a news conference.

The 2002 report indicates that:

- African Americans were stopped at a rate 36 percent higher than expected based solely on their proportion of the driving age population.
- Statewide, 12.6 percent of blacks were searched, compared to 7.1 percent of whites. Hispanic drivers were stopped at a rate only a little more likely than their proportion of the population but were more than twice as likely to be searched as white drivers.

2002
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MISSOURI TRAFFIC STOPS
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Nixon cautioned that racial profiling could neither be proved or disproved by statistics alone, and that a statistical disproportion did not prove that traffic stops decisions are being based solely on inappropriate factors.

Nixon said a list of the 59 agencies that did not meet the reporting deadline has been sent to the governor. State law allows the governor to withhold funds from agencies that do not comply.

"Missouri has been a national leader in committing resources to assessing racial disparities in traffic stops and eliminating them," Nixon said. "The overwhelming majority of law enforcement agencies and their officers have diligently complied with Missouri law by collecting this information and have worked with my office to ensure that our analysis is as accurate as possible."

Miranda warnings require custody

In *State v. Darian Seibert*, the Missouri Court of Appeals, Southern District, held that a police officer did not violate a suspect's rights when the officer continued to question after the suspect requested a lawyer. The reason is significant – the suspect was not under arrest nor in custody.

Seibert and some friends burned a trailer to cover up a death. Seibert was badly burned and treated at a hospital where he gave incriminating statements to an officer. The statements came after the officer continued to question Seibert after he had requested a lawyer. Seibert eventually described the events surrounding the fire.

On appeal, Seibert argued that once he requested a lawyer, the questioning should have ended and his admissions not used at trial. The Southern District noted, however, that the "*Miranda* right to counsel is not triggered during non-custodial interrogations." Had Seibert been under arrest, the officer had an obligation to inform the defendant of his" *Miranda* rights before questioning, and to end questioning once Seibert requested a lawyer.

The fact that Seibert was in a hospital room is not considered custody. Since Seibert was not arrested or restrained, the officer was not required to inform the suspect of his *Miranda* rights nor required to stop questioning. Although hospitalized, Seibert still had the Fifth Amendment right to remain silent and to ask the questioning officer to leave.

Note: Seibert is the son of Patrice Seibert, whose appeal is before the U.S. Supreme Court (Page 1).

SUPREME COURT:

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- In *Illinois v. Lidster*, the court must decide whether it is proper for officers to set up a roadblock to find leads to solve a week-old crime that had occurred in the same area.

During the roadblock, a drunken driver was detected, but the driver convinced the Illinois Supreme Court that the roadblock was illegal.

The case will have important implications in situations where officers set up roadblocks to capture escapees or gather information in serious crimes.

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UPDATE: CASE LAW

SOUTHERN DISTRICT

DNA EVIDENCE, STR METHOD

State v. Glenn E. Faulkner
No. 24851
Mo.App., S.D., March 27, 2003

DNA evidence using the STR method of DNA typing was admissible. The defendant argued that the state failed to establish that the STR typing method was generally accepted within the applicable scientific community, namely the fields of molecular and biological science, and that evidence revealed "the primers contained in the Profiler Plus and COfiler kits have not been released to the scientific community for peer review and verification of the validity of the method to produce correct results" and thus are not generally accepted in the scientific community.

The defendant presented no evidence at the Frye hearing that molecular biology or chemistry is the applicable field of science. In addition, the test kits at issue did not involve new scientific techniques.

The concerns about the reliability of the results produced by the test kits did not implicate the reliability or general scientific acceptance of the principles on which the STR test itself is based.

PAT-DOWN SEARCHES

State v. Lonnie J. Moore Jr.
No. 24858
Mo.App., S.D., March 25, 2003

The court reversed the defendant's conviction of possession of crack cocaine since the state failed to meet its burden justifying the warrantless search of the appellant's clothing, and failed to demonstrate that such a warrantless search fell within an exception to the warrant requirement. The state failed to prove the incriminating character of the object or that its incriminating character was immediately apparent to the officer during a pat-down search.

CONFRONTATION, PRELIMINARY HEARING TESTIMONY

State v. Crystal Pacheco
No. 24625
Mo.App., S.D., April 17, 2003

In a prosecution for second-degree murder, DWI and leaving the scene of an accident, the court properly admitted evidence from the defendant's van.

Police officers were lawfully present in a public place when the defendant's driveway at home and the evidence connected to the crime — the van — was in plain view. Paint chips, Bondo, and the van were properly seized under the automobile exception to the warrant requirement.

The record does not suggest that the defendant sought to prevent public entry to her property via a fence, gate or other measure. The defendant parked the van in her driveway in plain view to passing motorists. The damage to the van was readily apparent. Such factors fail to suggest that the defendant had any expectation of privacy for her driveway and property sitting on it.

The trial court properly admitted testimony provided at a preliminary hearing by a witness, who died before trial, who identified the defendant as the driver of the van at the time the defendant had testified she was not operating her van. The defendant attended the preliminary hearing where counsel cross-examined the witness and defendant was aware of inconsistencies of the witness's testimony prior to the examination. The defendant's confrontation rights were met.